FILED
05-433 OCT 5 - 2005
OFFICE OF THE CLERK

No. 05-

IN THE

Supreme Court of the United States

DREAMSCAPE DESIGN, INC., a corporation,

Petitioner,

v.

AFFINITY NETWORK, INC., a corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GARY D. FORRESTER
Counsel of Record
JOSEPH W. PHEBUS
PHEBUS & KOESTER
136 West Main
Urbana, IL 61801
(217) 337-1400

Attorneys for Petitioner

197008

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

The United States Court of Appeals for the Seventh Circuit affirmed the district court's decision that federal telecommunications law impliedly preempts the state law claims of plaintiff Dreamscape Design, Inc. The Seventh Circuit held that even after detariffing in 2001, the "filed tariff doctrine" (sometimes referred to as the "filed rate doctrine"), developed by courts to ensure compliance with the Federal Communications Act of 1934, continues to preempt state law challenges to long-distance telephone service rates. In so holding, the Seventh Circuit expressly acknowledged that its decision was contrary to a 2003 decision of the United States Court of Appeals for the Ninth Circuit, which held that federal preemption could not, and did not, survive detariffing. The question thus presented is: Does the FCA continue, even after detariffing, to preempt state law challenges to a long-distance carrier's violations of its contractual and pre-contractual commitments?

CORPORATE DISCLOSURE STATEMENT

Dreamscape Design, Inc ("Dreamscape"), is a corporation organized and existing under the laws of Illinois, with its principal office located at One Henson Place in Champaign County, Illinois. Dreamscape is a creator and provider of website design and technology, animation and multimedia presentations, and promotional videos. Dreamscape has no parent company and is not publically traded.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cited Authorities

Page

Statutes:

TABLE OF APPENDICES

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 414 F.3d 665 (7th Cir. 2005). *See* App. A. The Seventh Circuit affirmed the July 12, 2004, decision of the United States District Court for the Central District of Illinois. *See* App. B.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit's opinion was rendered on July 5, 2005, and its mandate was issued on July 27, 2005. (App. A.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Pursuant to the Supremacy Clause, U.S. Const. Art. VI, cl. 2, federal law can preempt and displace state law. The "filed tariff doctrine" derives from the Federal Communications Act of 1934 (the "FCA"), as amended, 47 U.S.C. § 203. Under the Telecommunications Act of 1996, 47 U.S.C. § 160(a) ("the 1996 Act"), the Federal Communications Commission ("FCC") was empowered to exempt carriers from filing tariffs. Pursuant to the 1996 Act, the FCC issued a series of orders mandating detariffing.

Section 201(b) of the FCA provides:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice,

classification or regulation that is unjust or unreasonable is declared to be unlawful.

Section 202(a) of the FCA provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Section 203(a) of the FCA provides in relevant part:

> Every common carrier . . . shall . . . file with the Commission and print and keep open for public inspection schedules showing all charges . . . and showing the classifications, practices, and regulations affecting such charges. Such schedules shall . . . be posted and kept open for public inspection . . . each such schedule shall give notice of its effective date. . . .

Section 203(c) of the FCA provides in relevant part:

> [N]o carrier shall . . . charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named

> in any such [tariff] schedule than the charges specified in the schedule then in effect.

Section 160(a) of the 1996 Act directed the FCC to:

> forbear from applying any regulation or any provision of this chapter if the Commission determines that –
>
> > (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
> >
> > (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
> >
> > (3) forbearance from applying such provision or regulation is consistent with the public interest.

On March 25, 1996, the FCC issued a Notice of Proposed Rulemaking to "forbear from applying" the tariffing requirements of § 203 of the FCA. *Notice of Proposed Rulemaking*, 11 F.C.C.R. 7,141 (1996). Following a comment period, the FCC issued an order of mandatory detariffing on October 29, 1996. *See Second Report and Order*, 11 F.C.C.R. 20,730 (1996). As the Seventh Circuit noted (*see* App. A at 8a), "the tariff requirement was canceled altogether" as of July 31, 2001.

STATEMENT OF THE CASE

This petition seeks review of a decision of the United States Court of Appeals for the Seventh Circuit, upholding a decision of the United States District Court for the Central District of Illinois, with respect to federal preemption under the FCA's filed tariff doctrine. The Seventh Circuit's decision is expressly contrary to that of the United States Court of Appeals for the Ninth Circuit in *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003).

Dreamscape's amended complaint was filed on April 23, 2004, asserting *inter alia* that Affinity violated the Illinois Consumer Fraud and Deceptive Practices Act ("ICFA"), 815 ILCS § 505 *et seq.*, and the common law of contracts, by misstating its rates for long-distance telephone service in its pre-contractual representations. Dreamscape claimed that Affinity advertised long-distance rates of five cents per minute for in-state service, and 8.9 cents per minute for calls from Illinois to elsewhere in the continental United States. However, when Affinity invoiced Dreamscape for its services, it billed by "total call unit" (or "TCU"), instead of by the minute, resulting in substantially higher long-distance telephone rates than stated by Affinity in its representations. All of Affinity's relevant conduct and services took place after 1996 (following Congress's passage of the 1996 Act, which ended the mandatory filing requirements of the FCA). Dreamscape's amended complaint further stated a claim based on breach of contract by Affinity after July 31, 2001 (when the FCA's tariff requirement had been canceled altogether). Dreamscape's amended complaint sought, *inter alia*, monetary damages in the amount suffered.

Affinity filed a motion to dismiss the amended complaint, arguing that Dreamscape's claims were preempted by federal law. On July 12, 2004, the district court entered an order granting Affinity's motion to dismiss, on the basis of the Seventh Circuit's decision in *Boomer v. AT&T Corp.*, 309 F.3d 404 (7th Cir. 2002). Following Dreamscape's appeal, the Seventh Circuit affirmed the district court's decision on July 5, 2005. The Seventh Circuit's mandate was issued on July 27, 2005. This petition follows.

REASONS FOR GRANTING THE PETITION

This petition should be granted for two principal reasons. First, the decision of the Seventh Circuit flatly and expressly conflicts with the decision of the Ninth Circuit in *Ting*, and this Court is respectfully asked to resolve this conflict. Second, the continued application of federal preemption after detariffing, in the absence of any constitutional or statutory basis, flies in the face of federalist principles and judicial precedent. The resolution of the issues in this case is of great importance for telecommunications consumers and carriers, with national significance for other industries that, historically, have been regulated pursuant to notions of federal preemption.

Sections 201(b) and 202(a) of the FCA do not contain preemptive text, and after detariffing, the tariff-filing requirement of § 203 (which does contain impliedly preemptive text) is no longer enforced by the FCC. Thus, express preemption is not an issue here, and the Seventh Circuit's decision was not based on express exemption. Likewise, field preemption (sometimes referred to as complete preemption) is not germane because state law unquestionably plays a role in the regulation of long-distance

contracts, as the Seventh Circuit itself has acknowledged. *See Boomer*, 309 F.3d at 424 (rejecting AT&T's field preemption argument, and stating that "following detariffing there appears to be some role for state law"). Thus, if federal preemption under the FCA is to survive detariffing, and indeed to expand to market-based contracts, it can only be by way of the third prong of preemption analysis, i.e., implied conflict pre-emption. *See Pac. Gas & Elec. Co. v. Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983), *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987).

Five months ago, in its consideration of the scope of federal preemption in the context of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), this Court had occasion to confirm its reluctance to expand a federal statute beyond its ordinary meaning through doctrines of implied preemption. *Bates v. Dow Agrosciences LLC*, __ U.S. __, 2005 WL 957193 (April 27, 2005). As observed by Justice Thomas (joined by Justice Scalia), concurring in part and dissenting in part, "this reluctance reflects that pre-emption analysis is not '[a] freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'" (*citing Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 111 (1992), Kennedy, J., concurring in part and concurring in judgment). *Bates* at *15. Rather, the proper inquiry is into "whether the ordinary meanings of state and federal law conflict." *Id. See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 617 (1997). Accordingly, the determination of the issues in the instant case requires an examination of the words of the FCA, subject to the alterations made by Congress in the 1996 Act. Those words should be assessed according to their ordinary meaning. *Bates* at *14 (Thomas, J., joined by Scalia, J., concurring in the judgment in part and dissenting in part).

Prior to 1996, the FCA required long-distance telecommunications carriers to set forth the rates and other terms and conditions of their service in tariffs to be filed with the FCC. This regulatory scheme begat the court-developed "filed tariff doctrine," under which carriers were required to charge rates as set forth in the filed tariffs; carriers were specifically prohibited from deviating from the tariffed rates. *AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 221-23 (1998); *Metro E. Ctr. for Conditioning & Health v. Qwest Communications Int'l, Inc.* 294 F.3d 924, 925 (7th Cir. 2002) ("[n]o private agreement can displace a tariff's terms"). The FCA completely preempted state law challenges to rates contained in a filed tariff. *See, e.g., Cahnmann v. Sprint Corp.*, 133 F.3d 484, 489-90 (7th Cir. 1998).

The mandatory tariffing aspect of the regulatory scheme came to an end following passage of the 1996 Act, which effectively adopted the free-market approach the FCC had advocated over the preceding fifteen years, due to increased competition and technological advances. *See MCI Telecomms. Corp. v. AT&T Corp.*, 512 U.S. 218, 220-21 (1994); *see also MCI Telecomms. Corp. v FCC*, 765 F.2d 1186, 1193 (D.C. Cir. 1985) (holding that the FCC lacked statutory authority to prohibit the filing of tariffs, as it had tried to do). Armed with the legislative authority of the 1996 Act, the FCC issued a series of orders mandating detariffing, and as of July 31, 2001, the tariff requirement was canceled altogether. *See Boomer*, 309 F.3d at 408-09.

After detariffing in 1996, the old monopoly-based regime was replaced with one based on market competition. Long-distance telephone service for any particular consumer is now arranged by way of an individual contract between the consumer and the carrier, often called a "customer service

agreement," or "CSA." This market-based approach depends in part on state law for the protection of consumers in the deregulated and competitive marketplace. *See Order on Reconsideration*, 12 F.C.C.R. 15,014, p. 42 (1997) (after detariffing, consumers will "not only have our complaint process, but will also be able to pursue remedies under state consumer protection and contract laws"); *Second Report and Order*, 11 F.C.C.R. 20,730, p. 5 ("when interstate . . . services are completely detariffed, consumers will be able to take advantage of remedies provided by state consumer protection laws and contract law against abusive practices"). Nevertheless, the Seventh Circuit in *Boomer* held that, even after detariffing, federal law continues to govern these market-based contracts, as it had previously governed filed tariffs, and that state law cannot be the basis for challenging a carrier's conduct if such a challenge might affect the contractually-stated rates. *Boomer*, 309 F.3d at 418-19.

One year after *Boomer*, and expressly contrary to the Seventh Circuit, the Ninth Circuit concluded in *Ting* that the preemptive effect of the filed tariff doctrine did not survive the passage of the Telecommunications Act of 1996. *Ting*, 319 F. 3d at 1135. The Ninth Circuit expressly rejected *Boomer's* preemption analysis, concluding that, in the detariffed environment, state laws did not obstruct the operation of the FCA. *Id.* The Ninth Circuit held that, with the passage of the 1996 Act, the goals expressed in Sections 201 and 202 of the FCA (reasonableness and nondiscrimination) were to be enforced by application of state contract and consumer protection laws. *Id.* at 1144-45. Accordingly, the Ninth Circuit held that the plaintiffs could challenge the carrier-drafted CSA under California state law.

Two years later, in the case at bar, the Seventh Circuit considered petitioner Dreamscape's challenge to the correctness of *Boomer*, in the light of *Ting*. The Seventh Circuit observed (as Dreamscape readily conceded) that Dreamscape's breach of contract claim was a challenge to Affinity's rates and terms as set forth in its CSA. However, the Seventh Circuit rejected Dreamscape's argument that its consumer fraud claims were based on pre-contractual conduct, holding that Dreamscape's "fraud claims are really no different than a breach of contract claim." (App. A at 18a, 16a.) Thus construed, the Seventh Circuit opined that none of Dreamscape's claims could survive "unless we 'revisit' *Boomer* – by 'revisit,' we assume that Dreamscape is asking that we either distinguish *Boomer* or set it aside in favor of the Ninth Circuit's *Ting* decision." (App. A at 18a.) The Seventh Circuit saw "no way . . . to distinguish *Boomer*," and was "unpersuaded by *Ting*." *Id.*

The Seventh Circuit in *Dreamscape* expressly rejected *Ting's* analysis, stating that "we disagree with [the Ninth Circuit's] interpretation [of the FCA]," and noting that in *Boomer*, the Seventh Circuit had "rejected the very district court opinion that *Ting* affirmed." (App. A at 19a.) Thus, the Seventh Circuit restated its holding in *Boomer* that even after detariffing, state law cannot operate to alter the rates of a long-distance service contract. In reaching this conclusion, the Seventh Circuit in *Dreamscape* declined to undertake a comprehensive preemption analysis. Rather, the Seventh Circuit simply concluded that allowing state law challenges to contractual rates "would be contrary to Congress's intent as expressed in Sections 201 and 202" of the FCA. (App. A at 19a.)

That Congressional intent, as perceived by the Seventh Circuit in *Boomer*, was to favor reasonably uniform rates

and to disfavor "unreasonable discrimination," within the meaning of §§ 201 and 202. *Boomer*, 309 F.3d at 419-20. From those principles, the Seventh Circuit in *Boomer* crafted an ongoing federal preemption in a detariffed environment, even though the filing requirement of § 203 (which was the source of the filed tariff doctrine and federal preemption under the FCA) had been legislatively abandoned.

As the Ninth Circuit observed in *Ting*, "save for *Boomer*, no court [had] ever referred to § 201 or § 202 [of the FCA] in declaring a carrier's tariff immune from state-law challenge." *Ting*, 319 F.3d at 1138. Rather, federal preemption, prior to *Boomer*, derived if at all from the filing requirement of § 203. *See AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 223 (1998); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 127 (1990). Now that the FCC no longer enforces § 203's filing requirement (in furtherance of the clear wording of the 1996 Act), the ordinary meaning of the FCA (notably the ordinary meaning of §§ 201 and 202) provides no ongoing basis for federal preemption.

Although §§ 201 and 202 survived the 1996 Act and detariffing, and thereby continue to provide a basis for the principles stated therein of reasonableness and nondiscrimination in connection with telecommunications services, the same cannot be said of the separate principle of preemption, which was a judicially-created product of the filed tariff doctrine – a doctrine that by definition did not survive detariffing. *See Notice of Proposed Rule Making*, 11 F.C.C.R. 7,141, p. 31 ("the absence of tariffs would eliminate possible invocation by carriers of the filed rate doctrine").

In the final analysis, the Seventh Circuit's misreading of the clear language of the FCA has the result that a long-distance carrier such as Affinity can say one thing, but do another, with immunity if not impunity. Dreamscape's amended complaint states that Affinity promised to charge by the minute, then sent invoices demanding higher payments based on the TCU method. Affinity's position is that, even if this assertion in the amended complaint is true, Affinity cannot be sued under Illinois law. Under the FCA as it was between 1934 and 1996, such protection from state challenge was the recognized law of the land, according to tariff-based federal preemption. But as the Ninth Circuit recognized, with the statutory demise of the mandatory filed tariff, no legislative language remains in support of federal preemption. Even more importantly, the ordinary meaning of §§ 201 and 202 of the FCA provides no basis for expanding federal preemption to commercial dealings between contracting parties.

Because the Seventh Circuit's holdings in *Boomer* and *Dreamscape* are contrary to the text of both the FCA and the 1996 Act, and because the ordinary words of the FCA and the 1996 Act provide no statutory basis for continued federal preemption in a detariffed environment, the decision below should be reversed so that Congress's clear wording is honored. Federal preemption should not be judicially resurrected in a market-based telecommunications industry, let alone expanded to interfere with market-driven contractual arrangements. Certiorari is warranted to resolve the split between the Ninth Circuit and the Seventh Circuit as to the post-tariff viability of federal preemption in the field of telecommunications.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

Gary D. Forrester
Counsel of Record
Joseph W. Phebus
Phebus & Koester
136 West Main
Urbana, IL 61801
(217) 337-1400

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JULY 5, 2005

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-3035

DREAMSCAPE DESIGN, INC.,

Plaintiff-Appellant,

v.

AFFINITY NETWORK, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District District of Illinois
No. 02 C 2235—**Michael P. McCuskey**, *Chief Judge*

ARGUED JANUARY 5, 2005—DECIDED JULY 5, 2005.

Before KANNE, ROVNER, and SYKES, *Circuit Judges.*

KANNE, Circuit Judge. Dreamscape Design, Inc., sued Affinity Network, Inc., alleging state law claims of fraud and breach of contract relating to the cost of long-distance telephone services provided by Affinity. The district court concluded that federal law preempted Dreamscape's claims and dismissed the complaint. We affirm.

Appendix A

I. Background

In September 2002, Dreamscape filed a class action complaint in Illinois state court, alleging that Affinity violated the Illinois Consumer Fraud Act ("ICFA") by making misrepresentations about its rates for long-distance telephone service. Dreamscape claimed that Affinity fraudulently advertised certain per-minute rates when, in fact, the rates charged were based upon a wholly different method of calculation. Specifically, Dreamscape alleges that Affinity advertised long-distance rates of 5 cents per minute for in-state service and 8.9 cents per minute for calls from Illinois to elsewhere in the continental United States. Yet when Affinity invoiced Dreamscape for services, it billed by "TCU"[1] instead of by the minute. According to Dreamscape, Affinity's use of TCU-based charges resulted in substantially higher long-distance telephone rates than suggested by the advertisements. Dreamscape attached to its complaint invoice examples of TCU-based billing that resulted in charges equal to more than twice what the perminute charges would have been. Dreamscape's complaint sought award of monetary damages in the amount suffered by the class, punitive damages, and injunctive relief.

In November 2002, Affinity removed the case to federal court. Affinity argued that, as an interexchange telephone communications carrier, it was subject to regulation by the Federal Communications Commission ("FCC")—

1. A TCU, or "total call unit," apparently is an abstract measure, calculated in whole numbers and fractionally in tenths, that Affinity uses to determine what to charge for its long-distance services.

specifically the so-called "filed tariff"[2] (or filed rate) doctrine—pursuant to the Federal Communications Act of 1934 (the "FCA"), as amended, 47 U.S.C. § 203. Thus, Affinity contended, Dreamscape's claims challenged Affinity's rates, the terms of which were set forth in its federally mandated tariff filed with the FCC, so Dreamscape's claims were necessarily preempted by federal law.

On March 17, 2003, the district court agreed with Affinity and denied Dreamscape's motion to remand, concluding that the bulk of the claims advanced in Dreamscape's class action complaint were indeed related to Affinity's rates for long-distance service, thus calling for federal preemption under the filed rate doctrine. The court also granted Affinity's motion to compel arbitration in accordance with a clause in Affinity's tariff mandating arbitration of disputes.

The arbitrator rendered a decision on April 12, 2004, concluding that Affinity's federally filed tariff overrode state law resolution of Dreamscape's claims. The arbitrator found that there was therefore "no remedy for the Plaintiff for any fraudulent misrepresentations made by the Defendant as alleged" and dismissed Dreamscape's claims. But, because of a recent series of FCC orders calling for "detariffing"

2. As discussed in far greater detail *infra*, a "tariff" sets forth a long-distance carrier's rates and other terms of service. Prior to August 1, 2001, under the terms of the Federal Communications Act of 1934, carriers were required to file their tariffs with the FCC, which had the power to modify or even disapprove the tariffs. *See Cahnmann v. Sprint Corp.*, 133 F.3d 484, 487 (7th Cir.1998). Once the tariffs were filed, the carriers could not deviate from their terms unless the tariffs were amended, modified, superseded, or disapproved in accordance with FCC rules. *See id.*

(cancellation of the requirement to file such tariffs with the FCC) by July 31, 2001, and because it was unclear whether Dreamscape's complaint alleged acts taking place after detariffing, Dreamscape was granted leave to amend its complaint to clarify the issue.[3]

On April 23, 2004, Dreamscape filed an amended class action complaint, in which it renewed its earlier ICFA claim regarding rates charged prior to the detariffing deadline of August 1, 2001. Significantly, Dreamscape also added a claim alleging that it and other putative class members used and were invoiced for Affinity's services after detariffing. Dreamscape purported to be advancing "only state law claims, which claims are based on conduct of the defendant occurring after . . . July 31, 2001, and accordingly there is no applicable tariff that . . . could possibly preempt the claims under federal law [,] and no other federal law question is raised . . . ." Dreamscape also added a claim for breach of contract, alleging that a contract was formed between Affinity and Dreamscape (and other putative class members) upon acceptance of Affinity's services, and Affinity breached the contract by charging rates in excess of the agreed rates "subsequent to July 31, 2001." Dreamscape in its amended complaint again sought monetary damages, punitive damages, and injunctive relief.

---

3. It is undisputed that prior to August 1, 2001, Affinity charged Dreamscape in accordance with the terms provided for in its filed tariff. Affinity gave Dreamscape notice that effective August 1, 2001, its services would be provided in accordance with rates, terms, and conditions contained in a customer service agreement ("CSA") that Affinity posted on its website.

Affinity filed a motion to dismiss the amended complaint, arguing that Dreamscape's claims remained preempted by federal law. For its part, Dreamscape again filed a motion to remand the case to state court. On July 12, 2004, the district court entered an order granting Affinity's motion to dismiss and denying Dreamscape's motion to remand as moot. The court concluded that, pursuant to this court's opinion in *Boomer v. AT & T Corp.*, 309 F.3d 404 (7th Cir.2002), federal law governs the rates, terms, and conditions of long-distance service contracts, and state law cannot operate to invalidate these contracts, even after detariffing. The court found that Dreamscape's amended complaint challenged Affinity's rates for its long-distance service, and therefore, consistent with *Boomer*, the court concluded that the new claims were likewise preempted by federal law. Accordingly, the court dismissed with prejudice Dreamscape's amended complaint.

On appeal, Dreamscape challenges the district court's dismissal of its amended complaint based on its interpretation of *Boomer*. In the alternative, Dreamscape urges that we reconsider our preemption holding in *Boomer* in light of conflicting Ninth Circuit precedent.

II. Discussion

We review *de novo* the district court's order dismissing Dreamscape's claims. *See Veazey v. Communications & Cable of Chi., Inc.*, 194 F.3d 850, 853 (7th Cir.1999). Before proceeding to the merits, however, we will briefly recap the aforementioned filed tariff doctrine and related caselaw. As we indicated earlier prior to August 1, 2001, the FCA

required long-distance telecommunications carriers to set forth the rates and other terms and conditions of their service in tariffs to be filed with the FCC. 47 U.S.C. § 203(a); 47 C.F.R. § 61.1. This regulatory scheme begat the filed tariff doctrine,[4] under which carriers are required to charge rates and otherwise abide by the terms set forth in the filed tariffs. *AT & T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 221-23, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998); *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 487 (7th Cir.1998). Carriers are specifically prohibited from deviating from the tariffed rates and are not free to negotiate different rates with customers. *See* 47 U.S.C. § 203(c); *see also Metro E. Ctr. for Conditioning & Health v. Qwest Communications Int'l, Inc.*, 294 F.3d 924, 925 (7th Cir.2002) ("No private agreement can displace a tariff's terms."); *Cahnmann*, 133 F.3d at 487. The doctrine also applies to non-rate provisions of a tariff, such as "provisioning of services and billing," so carriers may not depart from non-price terms, either. *See* 47 U.S.C. § 203(c); *Cent. Office Tel.*, 524 U.S. at 224-25, 118 S.Ct. 1956.

Although it may be tempting to view a filed tariff as simply another contract enforceable under state law, this court and others have recognized that tariffs are something more—at least the equivalent of federal regulations or law—so suits to challenge or invalidate tariffs arise under federal law. *Cahnmann*, 133 F.3d at 488-89; *see also Qwest*, 294 F.3d at 925; *accord Hill v. BellSouth Telecomms., Inc.*, 364

4. The FCA's filed tariff doctrine is derived from, and a close cousin to, the tariff provisions of the Interstate Commerce Act. *See AT & T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998).

F.3d 1308, 1315 (11th Cir.2004); *Bryan v. Bellsouth Communications, Inc.*, 377 F.3d 424, 429 (4th Cir.2004); *ICOM Holding, Inc. v. MCI Worldcom, Inc.*, 238 F.3d 219, 221 (2d Cir.2001); *MCI Telecomms. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir.1992). Under the filed tariff doctrine, courts may not award relief (whether in the form of damages or restitution) that would have the effect of imposing any rate other than that reflected in the filed tariff. *See Cahnmann*, 133 F.3d at 489. This is so even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation. *See Cent. Office Tel.*, 524 U.S. at 222, 118 S.Ct. 1956 (holding that the carrier cannot be held to the promised rate even if it conflicts with the published tariff).

The courts have enforced the apparent harshness of the doctrine because rigorous enforcement of filed tariffs serves Congress's goals of ensuring uniformity and preventing unreasonable prices or service discrimination among long-distance customers. *See* 47 U.S.C. §§ 201(b), 202(a); *see also Cent. Office Tel.*, 524 U.S. at 223, 118 S.Ct. 1956; *Cahnmann*, 133 F.3d at 487, 490. Accordingly, pursuant to the filed-tariff doctrine, courts have unhesitatingly found that claims purportedly challenging rates or terms of filed tariffs under state law were preempted. *See, e.g., Cahnmann*, 133 F.3d at 489-90; *Bryan*, 377 F.3d at 431-32.

The mandatory aspect of the regulatory scheme came to an end following passage of the Telecommunications Act of 1996. 47 U.S.C. § 160(a). Under the new legislative scheme, the FCC was empowered to exempt carriers from filing tariffs—rates, terms, and conditions of long-distance service would now be governed by individual contracts between each

carrier and its customers. Pursuant to the act, the FCC issued a series of orders mandating detariffing, and as of July 31, 2001, the tariff requirement was canceled altogether. *See Boomer*, 309 F.3d at 408-09 (describing history of detariffing and citing FCC orders).

Our opinion in *Boomer* addressed the preemption question in the wake of detariffing, when the terms of individual contracts or customer service agreements governed long-distance service. In *Boomer*, the plaintiff, an AT & T customer, brought a putative class-action suit alleging that AT & T overcharged customers in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. *See Boomer*, 309 F.3d at 408. Like Affinity, AT & T notified its customers that, after detariffing, all of its rates and conditions would be set forth in a customer service agreement. *Id.* at 409. AT & T's CSA included an arbitration clause, which the plaintiff challenged as unenforceable under Illinois law. The district court agreed with the plaintiff and denied AT & T's motion to compel arbitration.

We reversed the district court's order, holding that the plaintiff's state law challenges to the arbitration clause were preempted by federal law. *Id.* at 418. In so doing, we reaffirmed our *Cahnmann* holding that, prior to detariffing, "the [FCA] completely preempted state law challenges to the terms and conditions contained in a filed tariff." *Id.* at 424 (citing *Cahnmann*, 133 F.3d at 489-90). We also concluded, however, that Sections 201 and 202 of the FCA,[5]

---

5. Section 201(b) states:

> All charges, practices, classifications, and regulations for and in connection with such communication service,

(Cont'd)

read together, express Congress's intent that long-distance customers receive uniform and reasonable rates, terms, and conditions of service. *See Boomer,* 309 F.3d at 421-22. Section 203, which required the filing of tariffs, was simply the express means of effectuating Congress's intent, which remained unchanged despite the passage of the Telecommunications Act of 1996 and the onset of detariffing. *See id.* ("[D]etariffing does not alter the fundamental design of the [FCA], nor modify Congress's objective of uniformity in terms and conditions for all localities."). We also noted that although the FCC was authorized to dispense with the tariff-filing requirement, it must first ensure that, consistent with Congress's intent, a tariff would "not [be] necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly

---

(Cont'd)

> shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful[.]

47 U.S.C. § 201(b). Section 202(a) states:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

47 U.S.C. § 202(a).

or unreasonably discriminatory." *Id.* at 421 (quoting 47 U.S.C. § 160(a)(1)). Moreover, we recognized that even the FCC understood that detariffing "did not affect [FCC] enforcement of carriers' obligations under [S]ections 201 and 202[,]" which expressed Congress's intent. *Id.* at 422 (citation omitted). Thus, the FCA continues to provide federal remedies for customers seeking to challenge the justness and reasonableness of long-distance charges and practices. 47 U.S.C. §§ 207, 208; *see also Boomer,* 309 F.3d at 422.

We therefore opined in *Boomer* that allowing a state law challenge to AT & T's CSA "would result in customers receiving different terms based on their locality[,]" and could thwart Congress's intent by "creat[ing] a labyrinth of rates, terms and conditions." 309 F.3d at 418, 420. We concluded that state law "cannot operate to invalidate the rates, terms or conditions of a long-distance service contract[,]" even after detariffing. *Id.* at 424. The *Boomer* plaintiff's challenge to the validity of AT & T's arbitration clause amounted to a challenge of AT & T's contract and, necessarily, the contract's rates, terms and conditions. In sum, we determined that "[a]llowing [such a] state law challenge[] to the validity of the terms and conditions contained in [AT & T's] long-distance contract[] . . . [would] result [] in the very discrimination Congress sought to prevent." *Id.* at 423.

Turning to the merits in the present case, it is undisputed that Affinity provided its services in accordance with its filed tariff, and then, after detariffing, in accordance with the terms of its CSA. The critical question in this case is whether Dreamscape's claims are federally preempted as a matter of law even after detariffing—a result seemingly required by

our holding in *Boomer.* Dreamscape nevertheless does its level best to avoid application of *Boomer* by steadfastly insisting that its amended complaint in no way challenges Affinity's rates or filed tariff and therefore does not invoke the filed tariff doctrine. According to Dreamscape, Affinity engaged in pre-tariff (or pre-contract) fraud by inducing Dreamscape to purchase long-distance services that were not billed in accordance with the rates advertised in 1999, and Affinity is therefore liable under Illinois law. Dreamscape claims to have sustained damages for the alleged fraud after July 31, 2001, when the tariff was no longer in effect and Affinity's rates were thereafter delineated in its CSA.

Perhaps recognizing the uphill battle it faces with respect to *Boomer* and other preemption caselaw, Dreamscape styles this appeal as a simple dispute over the proper interpretation of its amended complaint—under the well-pleaded complaint doctrine, Dreamscape advanced only state law claims that did not challenge Affinity's rates, and thus federal law is not implicated at all. Dreamscape therefore argues that *Boomer* is not relevant to the present case. But even if *Boomer* applies, Dreamscape asks that we reconsider *Boomer*'s preemption holding in light of contrary reasoning in *Ting v. AT & T,* 319 F.3d 1126 (9th Cir.2003).

As for its breach of contract claim, Dreamscape candidly conceded at argument that the claim necessarily challenged the rates contained in Affinity's filed tariff, but nevertheless suggests that the claim is not necessarily preempted if we favor *Ting* over *Boomer* or otherwise resolve the apparent conflict between the two cases.

A. *Fraud*

We first consider Dreamscape's assertion that the well-pleaded complaint doctrine saves its fraud claims from preemption. Under this doctrine, "whether a case is one arising under the Constitution or a law or treaty of the United States . . . must be determined from what necessarily appears in the plaintiff's [complaint] . . . , unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." *City of Chicago v. Comcast Cable Holdings,* 384 F.3d 901, 904 (7th Cir.2004) (quoting *Taylor v. Anderson,* 234 U.S. 74, 75-76, 34 S.Ct. 724, 58 L.Ed. 1218 (1914)).

Dreamscape argues that the doctrine, as employed in our recent *Comcast* opinion, applies here, and we should reach the same result. We disagree. *Comcast* had nothing to do with long-distance services or filed tariffs or rates regarding such service. Instead, at issue in that case was 47 U.S.C. § 542, which governs franchise fees relating to cable operators. We concluded that the plaintiff's claims did not present a federal question because Congress did not intend § 542 "to override state law, let alone to deny states all power in the field." *Id.* at 905. Indeed, it was clear that Congress left to the states "most questions about the regulation and taxation of cable TV franchises." *Id.* Therefore, because Congress had not indicated its intent that federal law preempt state regulation of such franchises, the *Comcast* defendants' efforts to raise a § 542(b) federal defense to the plaintiff's action could not invoke federal jurisdiction over the city's state law claims. *See id.* We concluded that, pursuant to the well-pleaded complaint doctrine, the city pleaded only state-

law claims that did not implicate federal law, so it was necessary to remand the action to state court. *See id.*

Comcast is readily distinguishable from the present case, however. In contrast to § 542, there is no question that Congress intended the FCA to displace state law with respect to long-distance telephone service terms and conditions. *See Boomer,* 309 F.3d at 423. The only question here is whether such preemption survived detariffing, which we answered in the affirmative in *Boomer. Comcast* says nothing about that issue, so Dreamscape cannot simply invoke the well-pleaded complaint doctrine, as applied in *Comcast,* to save its claims from preemption here.[6]

A better case for Dreamcast is *In re Long Distance Telecommunications Litigation,* 831 F.2d 627 (6th Cir.1987) ("*Long Distance Litigation*"), which was decided prior to detariffing. In *Long Distance Litigation,* AT & T was alleged to have fraudulently advertised that its rates were lower than competitors' rates but hid the fact that it actually charged for uncompleted phone calls. 831 F.2d at 628. Among other claims, the plaintiffs filed various state law claims for fraud

6. For similar reasons, our opinion in *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069 (7th Cir.2004), does not help Dreamscape. That case dealt with a completely different provision of the FCA, 47 U.S.C. § 332(c)(3)(A), which governs mobile communications and specifically reserves to the states the right to regulate non-rate "terms and conditions of commercial mobile services." *Id.* at 1071. The plaintiff's claim did not challenge Cingular's rates or their reasonableness, nor did it challenge market entry as defined in § 332. *See Fedor,* 355 F.3d at 1074. Preemption was therefore not appropriate under § 332. *See id.* at 1074-75.

and deceit, and the Sixth Circuit held that the district court erroneously found these claims preempted by the FCA. *Id.* at 633-34. The court determined that the plaintiffs' claims did not relate to long-distance rates or service, but simply sought damages for AT & T's failure to disclose its practice of billing for uncompleted calls. *See id.* at 634. The court concluded, however, that if the case had related to such rates or service, preemption would be likely. *See id.*

In the present case, Affinity is alleged to have fraudulently advertised that it billed at per-minute rates, when in fact it billed by TCU. In certain respects, as Dreamscape alleges, Affinity's alleged fraud is facially difficult to distinguish from AT & T's. So it is helpful to look not only to the nature of the claims advanced, but also to the relief sought in order to determine whether the claims intrude upon the areas of communications law expressly reserved to the FCC's purview. *See Bastien v. AT & T Wireless Servs., Inc.*, 205 F.3d 983, 989 (7th Cir.2000). If, for example, the *Long Distance Litigation* plaintiffs sought rescission of the contract because of AT & T's failure to disclose its billing practices, we agree that preemption would be improper in that case. After all, such a claim arguably would not seek relief that would alter or affect AT & T's rates, terms, or conditions of service—the sort of requested relief that even the *Long Distance Litigation* court recognized as likely to bring a claim within the bounds of federal jurisdiction. 831 F.2d at 634 (citation omitted).

The precise relief sought by the *Long Distance Litigation* plaintiffs is not readily discernible, but it is clear, as we determined in *Cahnmann*, that the adjudication of those

plaintiffs' claims would not have required determining the validity of AT & T's tariff. *See Cahnmann*, 133 F.3d at 488. This stands in stark contrast to Dreamscape's claims in the present case—no matter how Dreamscape attempts to characterize them—so even *Long Distance Litigation* cannot save Dreamscape. Dreamscape does not seek rescission of the contract, but instead seeks monetary damages for what it claims to have overspent for long-distance service as a result of Affinity's alleged fraud—in other words, payment of the difference between what Affinity advertised and what Affinity's tariff or CSA provided for. We do not see how a court could possibly grant that form of relief without invalidating the contracted rates at issue, as delineated first in the filed tariff and then under the CSA. Payment of such damages would effectively grant a lower rate to Dreamscape than to other customers not included in the putative class and would require the court to determine a "reasonable" rate. *Cf. Bryan*, 377 F.3d at 431. Likewise, the special or punitive damages Dreamscape seeks would amount to a retroactive rate change as well. To grant any of this requested relief would be squarely at odds with both the filed tariff doctrine and our holding in *Boomer*.

As we noted in *Boomer*, with the passage of the Telecommunications Act of 1996, it is clear that Congress envisioned *some* role for state law after detariffing, so federal law no longer completely preempts the entire field. *Boomer*, 309 F.3d at 424. With respect to long-distance service contracts, however, we expressly held (and reaffirm now) that state law cannot operate to invalidate the terms and conditions of such contracts. Because Dreamscape's claim seeks relief that would in effect do just that, we fail to see

how Dreamscape's claims are not preempted in the same way the *Boomer* plaintiff's claims were. In short, we agree with the district court's conclusion that even after amending its complaint, Dreamscape's claims and the relief it sought primarily concern the rates Affinity has charged for its long-distance service and should be preempted.

Nevertheless, Dreamscape argues that it only challenges Affinity's pre-contract promises, not the rates or other terms of Affinity's tariff or CSA. According to Dreamscape, "[i]t matters not whether [Affinity] was selling cars or fruit or refrigerators or long-distance service. The ICFA requires that [Affinity's] advertising and solicitations be truthful." Dreamscape's blithe assertion notwithstanding, it *does* matter in this case what sort of goods or services Affinity sells, because that is precisely the point of *Boomer* and other cases exploring the bounds of preemption. In this instance, Congress has clearly indicated its goal of ensuring uniform and reasonable rates for long-distance service—thus calling for preemption in this area, if not the unrelated types of commerce Dreamscape lists.

Although Dreamscape argues that Affinity's actions amounted to simple fraud, we find that its fraud claims are really no different than a breach of contract claim (notwithstanding that it advances such a claim under a separate count, as discussed below), in terms of the relief it seeks. *See Cahnmann*, 133 F.3d at 490. As we indicated above, the relief Dreamscape seeks is impossible to grant without effectively invalidating Affinity's contractual rates, terms, or conditions. *See Boomer*, 309 F.3d at 423; *cf. ICOM*, 238 F.3d at 222- 23. The substance of Affinity's contractual

provisions cannot be severed from the alleged fraud that induced Dreamscape into purchasing Affinity's long-distance services to begin with. *Cf. Cahnmann,* 133 F.3d at 489 (noting that if the parties' contract had included a provision entirely unrelated to the tariff in which the defendant promised "to sell the plaintiff a bushel of Ugli fruit at market price," such a promise might be severable from the defendant's filed tariff and thus actionable under state law). Affinity's alleged fraud pertained to *something,* after all, and that "something" is set forth within Affinity's filed tariff and CSA, which detail the rates, terms, and conditions of which Dreamscape ultimately complains.

Therefore, it is the artful pleading doctrine, not the well-pleaded complaint doctrine, that properly guides interpretation of Dreamscape's amended complaint. *See Bastien,* 205 F.3d at 986 ("It is true that a plaintiff is ... master of his own complaint and may seek to avoid federal jurisdiction by pleading only state law claims, . . . but when that complaint, fairly read, states a federal question, the defendant may remove the case to federal court.") (internal citations omitted). Dreamscape seeks to convince us that its fraud claims do not touch upon Affinity's rates and, as the *Cahnmann* plaintiff did, "emphatically disclaims any intention of prosecuting a federal claim." *Cahnmann,* 133 F.3d at 489.

We are just as unpersuaded here as we were in *Cahnmann,* however. Our interpretation of Dreamscape's complaint and conclusion arise from an "uncontroversial application of the artful pleading doctrine." *Id.* at 490 (quotation marks omitted). Pursuant to *Boomer* and related

caselaw, we conclude that Dreamscape's fraud claims are federally preempted and were properly removed to federal court. *See Boomer,* 309 F.3d at 423; *see also Cahnmann,* 133 F.3d at 490 ("If a claim can arise only under federal law, because federal law has extinguished the state law basis under which it might otherwise arise, the case is removable to federal court even if the plaintiff sedulously avoids mention of federal law in his complaint."); *see also Bastien,* 205 F.3d at 986 ("[I]n some instances, Congress has so completely preempted a particular area that . . . removal is proper despite the well-pleaded complaint rule.") (citations omitted).

B. Breach of Contract

Dreamscape's remaining claim alleges that Affinity breached its contract. But Dreamscape candidly concedes (as it must) that this claim necessarily challenges Affinity's rates and terms as set forth in its tariff and CSA and thus cannot survive unless we "revisit" *Boomer*—by "revisit," we assume that Dreamscape is asking that we either distinguish *Boomer* or set it aside in favor of the Ninth Circuit's *Ting* decision. We see no way, however, to distinguish *Boomer* and, further, reaffirm it because our analysis in *Boomer* remains sound.

We are unpersuaded by *Ting.* Contrary to *Boomer,* the Ninth Circuit held that federal preemption under the filed tariff doctrine did not survive detariffing. *Ting,* 319 F.3d at 1135. In fact, the court expressly rejected *Boomer*'s preemption analysis, concluding that, in the detariffed environment, state laws did not obstruct Congress's intent with respect to the FCA. *See id.* The Ninth Circuit concluded

that, with the passage of the Telecommunications Act of 1996, Congress intended state contract and consumer protection laws to play a role in governing the carrier-consumer relationship after detariffing, and preemption did not survive the passage of the act. *See id.* at 1144. The court believed that Congress intended the goals expressed in Sections 201 and 202 to be enforced by application of state law. *See id.* at 1144-45. Therefore, the Ninth Circuit held, the plaintiffs could challenge the carrier's CSA under California state law.

We disagree with this interpretation. For the reasons we discussed at length in *Boomer,* we do not see how Congress's clearly expressed intent regarding uniformity and reasonableness of rates, as demonstrated in Sections 201 and 202 of the FCA, can be squared with *Ting*'s apparent conclusion that state contract law can invalidate the terms or conditions of long-distance contracts after detariffing. *See Boomer,* 309 F.3d at 417-23. Indeed, in *Boomer* we rejected the very district court opinion that *Ting* affirmed. *See id.* at 422. As indicated in *Boomer* and in this opinion, we conclude that even after detariffing, state law cannot operate to invalidate the rates, terms, or conditions of a long-distance service contract (which is precisely what Dreamscape's amended complaint seeks, whether it admits it or not) because such a result would be contrary to Congress's intent as expressed in Sections 201 and 202.

Dreamscape's claims are preempted by federal law, and removal of Dreamscape's action and dismissal of its amended complaint were appropriate.

III. Conclusion

For the reasons given, we AFFIRM the order of the district court dismissing Dreamscape's amended complaint.

A true Copy:

Teste:

____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, URBANA DIVISION FILED JULY 12, 2004

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS URBANA DIVISION

Case No. 02-2235

DREAMSCAPE DESIGN, INC., a corporation,

Plaintiff,

v.

AFFINITY NETWORK, INC., a corporation,

Defendant.

ORDER

This case is before the court for ruling on the Motion to Dismiss Second Amended Class Action Complaint (#54) filed by Defendant, Affinity Network, Inc., and the Motion to Remand (#56) filed by Plaintiff, Dreamscape Design, Inc. Following this court's careful consideration of the arguments of the parties, Defendant's Motion to Dismiss (#54) is GRANTED, and Plaintiff's Second Amended Class Action Complaint is dismissed with prejudice. Therefore, Plaintiff's Motion to Remand (#56) is DENIED as moot.

Appendix B

BACKGROUND

In September 2002, Plaintiff filed a Class Action Complaint in the circuit court of Champaign County. Plaintiff alleged that Defendant violated the Illinois Consumer Fraud Act by advertising that it provided long distance telephone service at certain per minute rates when, in fact, Defendant's bills were at rates based upon "TCU's" rather than per minute charges. According to Plaintiff, this resulted in rates substantially in excess of the advertised rates. Plaintiff attached to its Complaint copies of two of Defendant's advertisements, which included fax machine dates showing that they were faxed in 1999, and a copy of a 1999 invoice. On November 12, 2002, Defendant removed the case to this court. Defendant contended that Plaintiff's claims were preempted by federal law.

On March 17, 2003, this court entered an Order (#27) which denied Plaintiff's Motion to Remand (#8) and granted Defendant's Motions to Compel Arbitration and Stay Proceedings (#5, #24) and Defendant's Cross-Motion to Stay or Deny the Class Certification Motion as Premature (#17). This court agreed with the reasoning of Magistrate Judge David G. Bernthal in his Report and Recommendation (#21). This court stated that it agreed with the Magistrate Judge that "a review of the complaint makes it clear that this suit is primarily about the rates Defendant charged its customers for service." This court further stated that it agreed with the Magistrate Judge's conclusion that, because a large part of Plaintiff's claims were related to Defendant's methods and rates for billing long-distance service, a subject governed by Defendant's tariff, the purported state claims at issue in the

suit were preempted by federal law. This court noted that the tariff requirement was canceled on July 31, 2001, as part of the detariffmg program of the Federal Communications Commission (FCC) but that it appeared from the attachments to the Complaint that "Plaintiff's claims relate to the period before July 31, 2001, when tariffs were still required." This court also noted that the Seventh Circuit, in *Boomer v. A T & T Corp.*, 309 F.3d 404, 424 (7th Cir. 2002) held that, even after deregulation, the Communications Act of 1934 preempts state law in cases involving the rates, terms, and conditions of the contract between a long-distance carrier and its customers. In addition, this court found that the arbitration clause contained in Defendant's tariff required arbitration of Plaintiff's dispute. This court specifically found that "Defendant's tariff was in force when the dispute arose and thus governs its resolution." Plaintiff's Motion to Certify Class (#14) was stayed pending the outcome of arbitration.[1]

Subsequently, Plaintiff, on two occasions, asked this court to reconsider its ruling that its claim was preempted by federal law and subject to arbitration. On May 9, 2003, this court entered an Order (#34) which granted Defendant's Motion to Strike Plaintiffs Amended Motion for Reconsideration. Although this court struck the Amended Motion for Reconsideration, this court also stated that it had carefully reviewed the arguments made by Plaintiff and found them entirely without merit. This court stated, "[b]ecause the terms of service provided to Plaintiff by Defendant were governed by Defendant's filed tariff, the filed tariff doctrine

---

1. Plaintiff's Motion to Certify Class (#14) was later withdrawn with leave to reinstate at the conclusion of arbitration.

applies and operates to bar Plaintiffs purported state law claims. Plaintiffs claims are preempted by federal law."

On January 23, 2004, Plaintiff filed another Motion to Reconsider (#38). Plaintiff argued that this court should reconsider its Order denying remand based upon the January 22, 2004, decision of the Seventh Circuit in *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069 (7^{th} Cir. 2004). This court entered an Order (#47) on March 3, 2004, and denied Plaintiffs Motion. This court concluded that the decision in *Fedor* did not apply to the facts of this case and stated that "this court remains convinced that Plaintiffs claims in this case are related to Defendant's methods and rates for billing long-distance service, a subject governed by Defendant's tariff. Therefore, in this case, the question of 'whether the claim necessarily treads upon the federally-reserved areas' must be answered in the affirmative. See *Fedor*, 355 F.3d at 1072." However, this court denied Defendant's Motion for Sanctions in an Order (#49) entered on March 11, 2004. This court concluded that sanctions against Plaintiff were not warranted.

Thereafter, the arbitration proceedings continued before retired Judge Richard E. Neville. On April 12, 2004, Arbitrator Neville entered a decision in the case. The arbitrator first found that the dispute was governed by the arbitration clause in the tariff. The arbitrator next found that the tariff overrode State law and applied to the dispute "and that there is no remedy for the Plaintiff for any fraudulent misrepresentations made by the Defendant as alleged." The arbitrator therefore dismissed Plaintiff's claims. However, the arbitrator noted that July 31, 2001, was the

cancellation date for FCC tariffs and that the record was not clear regarding whether all of Plaintiffs claims occurred before July 31, 2001. Therefore, the arbitrator stated that he would allow Plaintiff to file an amended claim to address this issue if Plaintiff chose to do so.

On April 23, 2004, Plaintiff filed its Second Amended Class Action Complaint (#53).[2] In Count 1, Plaintiff stated that the Amended Class Action Complaint was designated as Count 1 and was not abandoned. However, Plaintiff acknowledged that this count was dismissed by the arbitrator on April 12, 2004. In Counts 2 and 3, Plaintiff alleged that it, and other putative class members, utilized Defendant's service subsequent to July 31, 2001. In Count 2, Plaintiff alleged that Defendant violated the Illinois Consumer Fraud Act and that "the plaintiff and the putative class members were damaged in that they paid more for their intrastate and interstate long distance service than the represented rate of 5 cents per minute for intrastate and 8.9 cents per minute for interstate long distance subsequent to July 31, 2001." In Count 3, Plaintiff alleged that a contract was formed between Defendant and Plaintiff and the putative class members upon their acceptance of Defendant's services. Plaintiff further alleged that the relevant term of this contract was that Plaintiff and the putative class members would pay 5 cents per minute for intrastate long distance and 8.9 cents

2. On February 4, 2003, Plaintiff filed an Amended Class Action Complaint (#22). However, this court noted, in its March 17, 2003, Order (#27) that it agreed with Defendant that the amended complaint did not cure the federal preemption of Plaintiff's claims as the "claims still hinge upon the amounts charged by Defendant, which are governed exclusively by Defendant's tariff."

per minute for interstate long distance. Plaintiff alleged that Defendant breached this contract by charging rates in excess of the contract rates "subsequent to July 31, 2001." Plaintiff attached to its Second Amended Class Action Complaint the same copies of Defendant's advertisements it attached to its original Complaint. As noted previously, these copies show that they were received by fax in 1999.

On May 7, 2004, a status conference was held before this court. At the conference, this court confirmed that, based upon the arbitrator's ruling, Plaintiff's claims were dismissed. However, this court noted that, since the arbitrator's ruling, Plaintiff had filed its Second Amended Class Action Complaint. This court therefore lifted the stay which had been imposed pending arbitration and also ruled that Count 1 of Plaintiff's Second Amended Class Action Complaint was dismissed. Defendant was allowed until June 21, 2004, to respond to Counts 2 and 3 of the Second Amended Class Action Complaint.

On June 18, 2004, Defendant filed a Motion to Dismiss Second Amended Class Action Complaint (#54) and a Memorandum of Law in Support (#55). Defendant argued that Plaintiff's claims are still preempted by federal law and must be dismissed. On June 28, 2004, Plaintiff filed a Motion to Remand (#56) and argued that its state law claims should be remanded back to the circuit court of Champaign County. On July 2, 2004, Plaintiff also filed a Reply to Defendant's Motion to Dismiss (#58). Plaintiff argued that its claims in Count 2 and Count 3 allege only state claims based on services rendered and invoices submitted by Defendant after July 31, 2001, after detariffing, and are not preempted.

ANALYSIS

In this case, this court previously ruled that Plaintiffs state law claims, as alleged in its Class Action Complaint and Amended Class Action Complaint, appeared to relate to the period before July 31, 2001, when tariffs were still required, and were therefore preempted by federal law and subject to arbitration based upon the arbitration clause in the tariff. The arbitrator concluded that, to the extent Plaintiff's claims arose before July 31, 2001, the tariff overrode state law and, thus, "there is no remedy for the Plaintiff for any fraudulent misrepresentations made by the Defendant as alleged." This court agrees with the arbitrator's conclusion. Prior to 2001, the Communications Act of 1934 (Communications Act), as amended by the Telecommunications Act of 1996, required long distance carriers to set forth their charges and other terms and conditions of service in tariffs filed with the FCC. *Boomer,* 309 F.3d at 408; *see also A T & T Co. v. Cent. Office Tel., Inc.,* 524 U.S. 214, 221-23 (1998). In the interest of preventing unreasonable and discriminatory charges, the rates a long distance carrier charged had to be the rates stated in its tariff. See *Cent. Office Tel.,* 524 U.S. at 221-22. Therefore, "even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff" *Cent. Office Tel.,* 524 U.S. at 222; *see also Boomer,* 309 F.3d at 408 ("Under the 'filed tariff doctrine,' customers were bound by the terms of the tariff even if they had never seen the tariff, and even if the consumers had been promised service under different rates, terms or conditions."). This is because "the policy of nondiscriminatory rates is

violated when similarly situated customers pay different rates for the same services." *Cent. Office Tel.*, 524 U.S. at 223.

The issue now before this court, raised by both Defendant's Motion to Dismiss and Plaintiff's Motion to Remand, is whether Plaintiff can bring state law claims, based upon the same alleged misrepresentations, because it has now alleged that it received invoices from Defendant after July 31, 2001. This court concludes that, based upon the Seventh Circuit's decision in *Boomer*, this question must be answered in the negative.

As noted previously, the tariff requirement was ended, effective July 31, 2001, by a series of orders from the FCC. *See Boomer*, 309 F.3d at 409. Instead of filing tariffs, carriers were then required to provide customers with notice of the rates, terms, and conditions of service, and to offer customers service under those terms and conditions. *Boomer*, 309 F.3d at 409; *see also Ramette v. A T & T Corp.*, __ N.E.2d __, 2004 WL 1393613, at * 1 (Ill. App. Ct. 2004). The customers could, in turn, accept or reject the carrier's offer. *Boomer*, 309 F.3d at 409; *Ramette*, 2004 WL 1393613, at *1. If the customer accepted the terms of the offer by continuing service, the terms and conditions set out by the carrier became the agreement between the customer and the carrier. *See Boomer*, 309 F.3d at 409-10. According to Defendant, on August 1, 2001, it provided Plaintiff (and its other long distance customers) with a notice stating that its services would be provided according to the terms and conditions posted on its website.[3]

---

3. Plaintiff has not disputed this assertion.

Appendix B

In *Boomer*, a class action suit was filed against A T & T alleging that it overcharged customers for contributions to federal universal service funds. In that case, A T & T sent out Customer Service Agreements to its customers in June 2001. A notice included with the agreements provided that, "by enrolling in, using, or paying for the services, you agree to the prices, charges, terms and conditions in this agreement." *Boomer*, 309 F.3d at 409. The agreements sent out by A T & T included an arbitration clause. *Boomer*, 309 F.3d at 410. The plaintiffs in *Boomer* argued that the arbitration clause was not enforceable under Illinois law. *Boomer*, 309 F.3d at 411. However, the Seventh Circuit held that state law challenges to the validity of the arbitration clause contained in the agreement were preempted by the Communications Act. *Boomer*, 309 F.3d at 418.

In reaching this conclusion, the Seventh Circuit stated that provisions of the Communications Act, and the Communications Act in general, "demonstrate a congressional intent that customers of individual long-distance carriers receive uniform terms and conditions of service" and "a congressional intent that individual long-distance customers throughout the United States receive uniform rates, terms and conditions of service." *Boomer*, 309 F.3d at 418. The Seventh Circuit determined that, allowing a state law challenge to the arbitration clause in the agreement "would result in customers receiving different terms based on their locality." *Boomer*, 309 F.3d at 418. The court also stated that section 201 of the Communications Act "declares unlawful rates, terms and conditions which are not just and reasonable, demonstrating Congress's intent that federal law govern the validity of the terms and conditions of long-

distance service contracts." *Boomer,* 309 F.3d at 418. The Seventh Circuit noted that allowing state law to determine the validity of the various terms and conditions would "create a labyrinth of rates, terms and conditions and this violates Congress's intent in passing the Communications Act." *Boomer,* 309 F.3d at 420. The court in *Boomer* went on to state that, following detariffing, "there appears to be some role for state law." *Boomer,* 309 F.3d at 424. The court therefore indicated that, after detariffing, the Communications Act does not completely preempt state law. *Boomer,* 309 F.3d at 424. However, the court specifically stated that state law "cannot operate to invalidate the rates, terms or conditions of a long-distance service contract." *Boomer,* 309 F.3d at 424.

In this case, this court has previously found that Plaintiff's claims are "primarily about the rates Defendant charged its customers for service" and are related to Defendant's methods and rates for billing long-distance service. The allegations in the Second Amended Class Action Complaint demonstrate that is still the case. The Seventh Circuit has clearly stated that federal law governs the rates, terms and conditions of long-distance service contracts and that state law "cannot operate to invalidate the rates, terms or conditions of a long-distance service contract." *Boomer,* 309 F.3d at 418, 420. Therefore, based upon *Boomer,* this court agrees with Defendant that Plaintiffs state law claims are still preempted, even though Plaintiff has alleged that it received invoices from Defendant after detariffing.

This court finds unavailing Plaintiff's various arguments regarding why *Boomer* does not apply to this case. Plaintiff

first argues that *Boomer* is factually distinct. Plaintiff contends that *Boomer* was limited to the narrow issue of the arbitration clause, an issue no longer present in this case. However, as already noted by this court, Plaintiff's state law claims in this case challenge the rates charged by Defendant, which is a subject the court in *Boomer* specifically stated is governed by federal law.

Plaintiff next argues that this court should follow the decision of the Ninth Circuit Court of Appeals in *Ting v. A T & T Corp.*, 319 F.3d 1126 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 53 (2003). The Ninth Circuit, in *Ting*, disagreed with the Seventh Circuit's decision in *Boomer* and found that the principle of preemption was a product of the filed rate doctrine and did not survive detariffing. *Ting*, 319 F.3d at 1138-46.

This court, however, is bound to follow the rulings of the Seventh Circuit, the Circuit in which this court is located, unless powerfully convinced that the Seventh Circuit would overrule that decision at the first opportunity. *See Brenner v. Brown*, 814 F. Supp. 717, 718 (N.D. Ill. 1993), *citing Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987); *see also McBride v. St. Anthony Messenger Magazine*, 2003 WL 1903381, at *8 (S.D. Ind. 2003). This court has no reason to believe that the Seventh Circuit would overrule its decision in *Boomer* and follow the reasoning of the Ninth Circuit in *Ting*.

Further, this court agrees with a recent decision of the Illinois Appellate Court which found that *Boomer* is the better reasoned of the two decisions. *See Ramette*, 2004

WL 1393613, at 6-8. The court in *Ramette* declined to follow *Ting* and specifically found that *Boomer* was "a well-reasoned opinion that detailed the congressional intent behind the [Communications Act]." *Ramette*, 2004 WL 1393613, at *6. The court also noted that the plaintiff in that case, in arguing that *Boomer* was incorrectly decided, failed "to recognize the purpose of the [Communications Act] was to advance uniformity in telecommunications services. Allowing state-law challenges to the [customer service agreement] would create a diversity in terms and conditions of service." *Ramette*, 2004 WL 1393613, at *6. The Illinois Appellate Court stated that it found *Boomer* "to be persuasive in its logic and reasoning." *Ramette*, 2004 WL 1393613, at *8. The court also noted that *Boomer* had been followed outside the Seventh Circuit in *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107 (D. Kan. 2003). *Ramette*, 2004 WL 1393613, at *8.

The court in *Universal Serv. Fund* noted that the FCC has stated:

> We therefore agree with A T & T, Spring, and WorldCom that the Communications Act continues to govern determinations as to whether rates, terms, and conditions for interstate, domestic, interexchange services are just and reasonable, and are not unjustly or unreasonably discriminatory. While the parties only sought certification that the Communications Act governs the determination as to the lawfulness of rates, terms, and conditions, we note that the Communications Act does not govern other issues,

> such as contract formation and breach of contract, that arise in a detariffed environment. As stated in the Second Report and Order, consumers may have remedies under state consumer protection and contract laws as to issues regarding the legal relationship between the carrier and customer in a detariffed regime.

Universal Serv. Fund, 300 F. Supp. 2d at 1120 (emphasis omitted), *quoting Order on Reconsideration, Interstate Interexchange Marketplace,* 12 F.C.C. Rep. 15014, 15057 (1997); see *also Ramette,* 2004 WL 1393613, at *9. This court concludes that the FCC's statement is entirely consistent with the Seventh Circuit's conclusion in *Boomer* that the rates, terms and conditions of long distance telephone service are governed by federal law and are not subject to a state law attack. The FCC's remaining statements regarding the availability of state law challenges of other issues, such as contract formation and breach of contract, does not help Plaintiff in this case. Plaintiff has alleged that Defendant made misrepresentations in its advertisements in 1999, before detariffing, and alleges that bills it received for services after July 31, 2001, were contrary to the advertised rates. Therefore, Plaintiff is not alleging the breach of a contract which was formed after detariffing.

Accordingly, for all of the reasons stated, this court agrees with Defendant that the state law claims alleged in Plaintiff's Second Amended Class Action Complaint are preempted and must be dismissed. Any relief Plaintiff believes it is entitled to must begin with a complaint to the FCC. *Ramette,* 2004 WL 1393613, at *11; *see also Boomer,* 309 F.3d at 420 n.9.

IT IS THEREFORE ORDERED THAT:

(1) Defendant's Motion to Dismiss the Second Amended Class Action Complaint (#54) is GRANTED. Plaintiffs Second Amended Class Action Complaint (#53) is dismissed with prejudice.

(2) Plaintiffs Motion to Remand (#56) is therefore DENIED as moot.

This case is terminated.

ENTERED this 9th day of July, 2004

s/ MICHAEL P. McCUSKEY
U.S. DISTRICT JUDGE

2

No. 05-433

Supreme Court, U.S.
FILED
NOV - 7 2005
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

DREAMSCAPE DESIGN, INC.,

Petitioner,

v.

AFFINITY NETWORK, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

DANNY E. ADAMS
KELLEY DRYE & WARREN LLP
8000 Towers Crescent Drive
Suite 1200
Vienna, Virginia 22182
(703) 918-2300

JOSEPH A. BOYLE
Counsel of Record
LAURI A. MAZZUCHETTI
KELLEY DRYE & WARREN LLP
200 Kimball Drive
Parsippany, New Jersey 07054
(973) 503-5900

Attorneys for Respondent

197697

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether state law challenges to the rates charged by common carriers for long distance telecommunications services are preempted by Sections 201 and 202 of the Federal Communications Act.

RULE 29.6 STATEMENT

Respondent Affinity Network Incorporated is a privately held corporation and has no parent corporation. No publicly held company owns 10% or more of the stock of Affinity Network Incorporated.

TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Page

CASES

INTRODUCTION

The question presented by petitioner Dreamscape Design, Inc. ("Petitioner") does not warrant review by this Court. First and foremost, this Court has already declined to review a case arguing that there is a split between the Court of Appeals for the Seventh Circuit's decision in *Boomer v. AT & T Corp.*, 309 F.3d 404 (7th Cir. 2002), and the Court of Appeals for the Ninth Circuit's decision in *Ting v. AT & T*, 319 F.3d 1126 (9th Cir.), *cert. denied*, 540 U.S. 811 (2003). This alleged split between *Boomer* and *Ting* (rather than any alleged split created by this case) is the sole basis asserted by the Petitioner for review. This Court declined review in *Ting* and no other circuit court has addressed the issue of federal preemption of claims challenging long distance telecommunications rates in a detariffed environment. Thus, there exists no basis to warrant this Court's intervention.

Further, significant factual differences between this case and *Boomer* and *Ting* weigh heavily against review by this Court. *Boomer* and *Ting* involved challenges to arbitration clauses contained in a consumer services agreement, while this case involves a direct challenge to the rates charged by respondent Affinity Network Incorporated ("Affinity") for long distance telecommunications service. There is no case that holds that a challenge to such rates is governed by state law. All of the cases uniformly hold that such challenges fall squarely within the scope of Section 201(b) and 202(a) of the Communications Act.

In any event, this case is a poor vehicle to address the relationship between federal and state law in the detariffed environment because the claims here arose while the tariff-filing requirement was in place, and therefore are inextricably connected to the tariff. Finally, given the ample redress available to consumers of long distance service under federal law, Petitioner fails to present an important question of federal law that would require this Court's intervention.

COUNTER-STATEMENT OF THE CASE

A. Regulatory Background

As a provider of interstate telecommunication services, Affinity is subject to federal regulation as a common carrier under the Federal Communications Act, 47 U.S.C. § 151 *et seq.* (the "Communications Act"). Indeed, as a "common carrier," the rates, terms, and conditions of interstate telephone service that Affinity may offer its customers are subject to the substantive requirements of Sections 201 and 202 of the Communications Act. *See* 47 U.S.C. §§ 201, 202. Under these provisions, carriers may impose only those "charges, practices, classifications, and regulations" that are "just and reasonable" under Section 201(b)), and may not engage in any "unjust or unreasonable discrimination" between customers regarding such rates, terms, or conditions of service pursuant to Section 202(a). *Id.* In addition, Section 202(a) bars carriers from making or giving any "undue or unreasonable preference or advantage to any particular person, class of persons, or locality." 47 U.S.C. § 202(a).

Until August 1, 2001, Section 203 of the Communications Act required long distance telecommunications carriers, including Affinity, to set forth the rates and other terms and conditions of their service in tariffs filed with the Federal Communications Commission (the "FCC"). *See* 47 U.S.C. § 203(a). Section 203 provided the FCC with a procedural vehicle that operated "[i]n furtherance" of the substantive standards of Sections 201 and 202 of the Communications Act. *American Broadcasting Cos. v. FCC*, 643 F.2d 818, 822 (D.C. Cir. 1980). It centralized all determinations of the lawfulness of the carriers' rates, terms and conditions at the FCC and enabled the FCC to review the tariffs under the standards of Sections 201 and 202. Under Section 203, all rates, terms, and conditions of interstate long distance service

were valid unless and until they were determined by the FCC (or by a court reviewing an FCC order) to violate the substantive requirements of the Act and the tariff was changed appropriately. *See id.* at 822-823; *see also* 47 U.S.C. § 203.

Under the "filed tariff doctrine," customers were bound by the terms of the tariff even if they had never seen the tariff. *See, e.g., Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). Customers were conclusively presumed to have "notice" of whatever rates, terms, and conditions were contained in the tariffs that were currently on file (*see id.*), and to have "accepted" these terms by using the long distance or other tariffed service. *Id.* at 127-28; *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 222-24 (1998).

Prior to 1996, the FCC entered orders exempting "nondominant carriers" (defined as those lacking market power) from the tariff-filing requirements of Section 203 of the Communications Act. *See Competitive Carrier, Fourth Report & Order*, 95 FCC 2d 554 (1983), *vacated by MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994); *see also Competitive Carrier, Sixth Report & Order*, 99 FCC 2d 1020 (1985), *vacated by MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985). Notably, the FCC's orders provided that the rates, terms, and conditions of these carriers' service would continue to be governed exclusively by the substantive requirements of Sections 201 and 202 of the Communications Act. *See id.* These Orders, however, were vacated on the ground that the FCC lacked the authority under the Communications Act to exempt certain carriers from the tariff-filing requirement of Section 203. *See MCI Telecommunications Corp.*, 512 U.S. at 234 (citing prior decisions).

When Congress passed the Telecommunications Act of 1996, however, it expressly gave the FCC the authority to

forbear from applying the tariff-filing requirement if the FCC determined that, among other things, the "enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory." 47 U.S.C. § 160(a)(1). Thus, continued fulfillment of the substantive requirements of Sections 201 and 202 was an express precondition to any detariffing order. *See id.*

Armed with this new authority, the FCC issued a series of orders providing that long-distance carriers were no longer required to file tariffs. *See Interstate Interexchange Marketplace*, 11 FCC Rcd. 20,730 (1996) ("*Second Report and Order*"); *Interstate Interexchange Marketplace*, 12 FCC Rcd. 15,014 (1997); *Interstate Interexchange Marketplace*, 14 FCC Rcd. 6004 (1999) (collectively, the "Detariffing Orders"). The carriers were now required to provide customers with notice of the rates, terms, and conditions of service, and to offer customers service under such terms and conditions. *See id.* The customers, in turn, could accept or reject the carrier's offer. *See id.* The FCC anticipated that carriers would enter into such contracts through the use of "short, standard contracts." *Second Report and Order*, 11 FCC Rcd. at 20,736.

The FCC determined that discontinuing the filing of tariffs would not affect the enforcement of the statutory standards under Sections 201 and 202 because: (i) customers retained the right under the "complaint process" of Section 208 of the Communications Act to file claims that a carrier's rates, terms, and conditions violated the substantive standards of Sections 201 or 202; and (ii) the development of fierce competition in the long distance services market meant that carriers were unlikely to seek to impose rates and terms of

service that violated Sections 201 or 202 and that "any attempt to do so would cause their customers to switch to different carriers." *Second Report and Order*, 11 FCC Rcd. at 20,743

B. Factual And Procedural Background

Affinity is a telecommunications company offering interstate service. It is undisputed that from 1999 (when Petitioner alleges that it became an Affinity customer) until August 1, 2001, Affinity charged Petitioner in accordance with the terms provided in its federally filed tariff. Appendix to Petition ("App.") 4a.

It is also undisputed that Affinity gave Petitioner notice that effective August 1, 2001, its services would be provided according to the terms and conditions set forth in a Customer Services Agreement (the "CSA") that Affinity posted on its website. *See id.* It is further undisputed that, beginning on August 1, 2001, Affinity provided its services to Petitioner in accordance with the terms and rates set forth in its CSA. App. 10a.

1. Proceedings Before The District Court

The district court's opinion exhaustively describes the proceedings before it. App. 21a-34a. Petitioner filed this putative class action against Affinity on September 26, 2002, in the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois, alleging that Affinity violated the Illinois Consumer Fraud Act ("ICFA"). App. 22a. Petitioner based its ICFA claim on its contention that, in early 1999, Affinity sent advertisements to it stating that it provided long distance telephone service at certain per minute rates when, in fact, Affinity's bills were based upon "TCU's" in accordance with

its filed tariff.[1] *See id.* Petitioner sought damages as a result of being charged the rates set forth in Affinity's federally-filed tariff, rather than the rates allegedly advertised to it by Affinity. *See id.*

On November 12, 2002, Affinity removed this case to the United States District Court for the Central District of Illinois on the grounds that, despite its state-law label, Petitioner's claim arose under federal law, and/or was preempted by federal law, because Petitioner was in actuality challenging the terms of Affinity's federal tariff. *See id.* Petitioner filed a Motion to Remand on November 18, 2002. In addition, in lieu of an answer, Affinity filed a motion to stay the proceedings and compel arbitration on November 15, 2002.

By Order entered on March 17, 2003, the district court denied Petitioner's motion to remand and granted Affinity's motion to compel arbitration and stay the case pending the outcome of arbitration. App. 22a. Thereafter, the case was sent to arbitration before retired Judge Richard E. Neville. App. 24a. On April 12, 2004, Arbitrator Neville entered a decision in the case, ruling that Petitioner's claims were barred by the filed tariff doctrine. *See id.*

Following its defeat in arbitration, Petitioner filed an amended complaint asserting state law breach of contract and consumer fraud claims, again alleging that its purported reliance on Affinity's advertising and solicitation in ***early 1999*** somehow resulted in damages supposedly sustained after the tariff-filing requirement was cancelled by the FCC

1. Petitioner attached to its complaint copies of two of Affinity's advertisements that were allegedly faxed to Petitioner in 1999, and a copy of a 1999 invoice for services provided by Affinity to Petitioner.

on July 31, 2001.[2] App. 25a-26a. Indeed, since its original claims were dismissed as barred by the filed tariff doctrine, in a last ditch effort to revive its case, Petitioner resorted to manufacturing a claim that it was "induced" by Affinity's alleged fraudulent conduct in early 1999 to sign up for service, but only sustained damages (in the form of paying more for long distance services) over two and one half years later. *See id.*

On June 18, 2004, Affinity filed a motion to dismiss the amended complaint, arguing, among other things, that Petitioner's claims were preempted by federal law, despite the fact that Petitioner's amended complaint purported to seek damages that were allegedly sustained post-detariffing. App. 26a. On July 12, 2004, the district court entered an order granting Affinity's motion to dismiss. App. 21a-34a. The court concluded that federal law governs the rates for long-distance service contracts, and state law cannot operate to invalidate these contracts, even after detariffing. App. 30a. Because Petitioner's amended complaint sought to invalidate Affinity's rates for its long-distance service, the district court held that it was preempted by federal law. *See id.* The district court also acknowledged that:

> [Petitioner] has alleged that [Affinity] made misrepresentations in its advertisements in 1999, before detariffing, and alleges that bills it received after July 31, 2001, were contrary to the advertised rates. Therefore, [Petitioner] is not alleging breach of a contract which was formed after detariffing.

App. 33a. Accordingly, the district court dismissed with prejudice Petitioner's amended complaint.

2. Petitioner attached to its amended complaint copies of the same advertisements that were allegedly faxed to petitioner in 1999, and a copy of the same 1999 invoice for services provided by Affinity to petitioner that were attached to Petitioner's initial complaint.

2. Proceedings Before The Court of Appeals For The Seventh Circuit

On appeal to the Seventh Circuit, Petitioner challenged the district court's dismissal of its amended complaint. App. 1a-20a. The Seventh Circuit affirmed the district court's ruling in its entirety. *See id.* Specifically, the Seventh Circuit opined that:

> Sections 201 and 202 of the FCA, read together, express Congress's intent that long-distance customers receive uniform and reasonable rates, terms, and conditions of service. . . . Section 203, which required the filing of tariffs, was simply the express means of effectuating Congress's intent, which remained unchanged despite the passage of the Telecommunications Act of 1996 and the onset of detariffing. *See id.* ("[D]etariffing does not alter the fundamental design of the [FCA], nor modify Congress's objective of uniformity in terms and conditions for all localities.") . . . [A]lthough the FCC was authorized to dispense with the tariff-filing requirement, it must first ensure that, consistent with Congress's intent, a tariff would "not [be] necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory.". . . . Moreover, . . . even the FCC understood that detariffing "did not affect [FCC] enforcement of carriers' obligations under [S]ections 201 and 202[,]" which expressed Congress's intent. Id. at 422 (citation omitted). Thus, the FCA continues to provide federal

> remedies for customers seeking to challenge the justness and reasonableness of long-distance charges and practices. 47 U.S.C. §§ 207, 208.

App. 8a-10a (internal citations omitted).

The Seventh Circuit found that the claims asserted in Petitioner's amended complaint, which challenged the fact that Affinity's rates were expressed in "TCU's" (either pursuant to Affinity's tariff or CSA) rather than cents per minute, were really challenges to the reasonableness and fairness of the rates charged by Affinity. App. 15a-16a. The Court ruled that it "agree[d] with the district court's conclusion that even after amending its complaint, [Petitioner's] claims and the relief it sought primarily concern the rates Affinity has charged for its long-distance service and should be preempted." App. 16a. Thus, the Court held that Petitioner effectively sought to invalidate Affinity's rates, which is not a claim that is cognizable under state law. App. 15a-16a (*citing Boomer*, 309 F.3d at 423-424).

Significantly, with respect to Petitioner's breach of contract claim, the Seventh Circuit held that the claim was barred based upon the fact that Petitioner "candidly conceded at argument that the claim necessarily challenged the rates contained in Affinity's filed tariff." App. 11a. Importantly, Petitioner has not disputed this admission in its Petition and has thereby admitted the uncontroverted notion that challenges to a carrier's rates must be governed by federal law. As that is the only issue presented by the Petition for review and Petitioners have essentially conceded the point, there is no reason for review.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT WARRANTING REVIEW BY THIS COURT

A. This Court Has Already Declined To Review The Alleged Split Between The Courts In *Ting* And *Boomer*

Petitioner's sole argument in support of its Petition is based upon the differing perspectives of the Ninth Circuit in *Ting v. AT & T*, 319 F.3d 1126 (9th Cir.), *cert. denied*, 450 U.S. 811 (2003) and the Seventh Circuit in the *Boomer v. AT & T Corp.*, 309 F.3d 404 (7th Cir. 2002), rather than any "split" generated by the Seventh Circuit's ruling in the instant case. Notably, this Court already declined to review the alleged split created by *Boomer* and *Ting* in October 2003, when it denied AT&T's Petition for Certiorari in *Ting*. *See* 450 U.S. 811 (2003).[3] Further, since this Court declined review in *Ting*, no other circuit court has weighed in on the issue creating the alleged split between the Seventh and Ninth Circuit. Thus, there is no new basis upon which this Court should now accept review.

In addition, it would be premature for this Court to review the alleged conflict created between *Boomer* and *Ting*. Since the FCC implemented its Detariffing Orders on August 1, 2001, only two circuit courts (the Seventh Circuit in *Boomer* and this case, and the Ninth Circuit in *Ting*) have considered the issue of preemption following detariffing. Thus, due to the limited number of courts that have weighed in on this issue, this Court's intervention is not warranted here.

---

3. In fact, as noted in Point B *infra*, there is no split between the holdings of *Boomer* and *Ting*.

B. Significant Factual Differences Between *Boomer* And *Ting* And This Case Weigh Heavily Against Review

1. *Boomer* And *Ting* Addressed Non-Rate Specific Issues, While This Case Directly Involves Rates

Unlike this case, which involves state law challenges to Affinity's long distance service rates (which fall squarely in the scope of Section 202(a)), both *Boomer* and *Ting* addressed state law unconscionability challenges to arbitration clauses in AT&T's CSA. Thus, as a precursor to their preemption analysis, the courts in *Boomer* and *Ting* had to address whether the arbitration clauses at issue affected the rates charged by AT&T. Here, there is no doubt that Petitioner's claims directly affected (and indeed attacked) Affinity's rates.

In *Boomer*, the court found that because the provisions requiring arbitration produce cost savings for carriers, they produce lower rates for telecommunications service. Therefore, the Seventh Circuit held that because rates were affected by the arbitration clauses, Sections 201 and 202 of the Communications Act were implicated and preempted state law challenges to those clauses. *See Boomer*, 309 F.3d at 418-21.

Contrary to the court's finding in *Boomer*, the Ninth Circuit in *Ting* relied on the district court's finding of fact, which was made following trial, that the arbitration clause at issue did not affect AT&T's rates, and on that basis, held that the plaintiff's challenges to the CSA's arbitration clause were not preempted by Section 201 or 202. *See Ting*, 319 F.3d at 1140-41, 47 ("the case at bench contains specific findings of fact, finding that the CSA's arbitration provisions did not in fact affect AT&T's costs" in providing service, and therefore could not possibly lead to either price

differences from state to state or in price discrimination among otherwise similarly situated customers.)[4]

2. This Case Directly Involves Rates And Is Therefore Distinguishable From *Ting*, And Not In Conflict With *Ting* Or *Boomer*

The different factual findings made by the courts in *Ting* and *Boomer*, as to whether arbitration clauses in CSAs have any effect on rates, is the only basis for the differences in the holdings of *Boomer* and *Ting*. Such a factual difference, however, does not create a split warranting this Court's review because unique factual findings, rather than the law, provide for the difference in result in these two cases. Further, in this case, there is no question as to whether Sections 201(b) and 202(a) are implicated because Petitioner challenges the rates charged by Affinity. App. 16a. Thus, this case is factually distinct from *Boomer* and *Ting*, and there is no conflict between the holding of this case and those of *Boomer* or *Ting*.

II. THIS CASE IS A POOR VEHICLE TO ADDRESS THE RELATIONSHIP BETWEEN FEDERAL AND STATE LAW IN THIS AREA BECAUSE OF THE UNIQUE FACTS OF THIS CASE

In any event, this case is a poor vehicle to address the relationship between federal and state law in the wake of detariffing because of the unique facts of this case. As the District Court ruled, and the Seventh Circuit affirmed, the

4. These findings of fact render the court's statements in *Ting*, regarding the lack of preemptive reach of Section 201(b) and 202(a) as to rates, dicta because the court found that *there was no evidence* to support the claim that the challenged portions of the CSA had any impact on rates. The court's statements in dicta are the statements that Petitioner relies on in support of its claim that there is a split between the Ninth and Seventh Circuits.

Petitioner's amended complaint here did not allege that Affinity made any misrepresentation or breached any contract formed after detariffing. Rather, in a meager effort to circumvent the filed tariff doctrine, Petitioner claimed that Affinity's advertising and solicitation in ***early 1999*** somehow resulted in damages supposedly sustained ***after July 31, 2001.***[5] App. 11a.

Because all of the wrongful conduct alleged by Petitioner here relates to the time period when the tariff-filing requirement was in effect, Petitioner's claims are barred by the filed tariff doctrine or at the very least, inextricably intertwined with the tariff. The law is settled that under the filed tariff doctrine, courts may not award relief (whether in the form of damages or restitution) that would have the effect of imposing any rate other than that reflected in the filed tariff. *See Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488-90 (7th Cir.), *cert. denied*, 524 U.S. 952 (1998); *see also Ting*, 319 F.3d at 1143. This is so even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation. *See Cent. Office Tel.*, 524 U.S. at 222 (holding that the carrier cannot be held to the promised rate even if it conflicts with the published tariff). Also under the filed tariff doctrine, customers of common carriers (including Petitioner) are charged with notice and knowledge of both the existence and the terms of the federally-filed tariff. *See Central Office Tel.*, 524 U.S. at 222; *Maislin Indus.*, 497 U.S. at 127 (*quoting Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915)). Under these precepts, all of Petitioner's claims against Affinity are barred by non-controversial application of the filed tariff doctrine.

---

5. There is no allegation that Petitioner relied on any advertisements or solicitations, after July 31, 2001. In addition, and as the Seventh Circuit found, it is undisputed that prior to August 1, 2001, Affinity charged Petitioner in accordance with the terms provided for in its filed tariff. Affinity gave Petitioner notice that effective August 1, 2001, its services would be provided in accordance with rates, terms, and conditions contained in a customer service agreement that Affinity posted on its website.

Petitioner's assertion in the Petition that "[a]ll of Affinity's relevant conduct and services took place after 1996 (following Congress' passage of the 1996 Act, which ended the mandatory filing requirements of the FCA)" demonstrates its fundamental misunderstanding of the 1996 Amendment to the Communications Act and the FCC's implementation of detariffing. Petition at p. 4. Indeed, Petitioner believes that because Congress amended the Communications Act in 1996, Petitioner's claims based on Affinity's alleged conduct in 1999 are not subject to the filed tariff doctrine. It is beyond debate, however, the tariff-filing requirement was not cancelled until two and one half years later, on July 31, 2001. *See Second Report and Order*, 11 FCC Rcd. 20,730 (1996); *Interstate Interexchange Marketplace*, 12 FCC Rcd. 15,014 (1997); *Interstate Interexchange Marketplace*, 14 FCC Rcd. 6004 (1999). Indeed, courts have applied the filed tariff doctrine to disputes arising after the enactment of the 1996 amendments to the Communications Act. *See Metro E. Ctr. For Conditioning & Health v. Qwest Communications Int'l, Inc.*, 294 F.3d 924, 925 (7th Cir. 2002) (detariffing did not occur until July 31, 2001 and the "tariff was in force when the parties' dispute arose [from February through July 2001] and thus governs its resolution").

Thus, by Petitioner's own account, it complains of its reliance on Affinity's advertisements during the time period when the tariff-filing requirements were still in effect. Because this case involves claims that arose prior to detariffing (despite Petitioner's best efforts to plead around the filed tariff doctrine) or at the very least, that are inextricably intertwined with the tariff, this case is a poor vehicle to address the relationship between state and federal law in a detariffed environment. Moreover, there is no unresolved split in the circuits regarding the application of the filed tariff doctrine. *See Central Office Tel.*, 524 U.S. at 222-24.

III. THE PETITIONER HAS NOT PRESENTED AN IMPORTANT FEDERAL QUESTION THAT WARRANTS THIS COURT'S REVIEW

Further, this Court should deny certiorari because the Petitioner has not presented an important federal question that warrants review by this Court. Petitioner argues that it presents an important question based on its erroneous claim the Seventh Circuit's ruling permits a carrier to "say one thing, but do another, with immunity if not impunity." Petition at p. 11. Petitioner's claim, however, misstates the law.

As recognized by the FCC, in the detariffed environment, long distance service customers are protected against unjust and unreasonable rates and practices by the substantive provisions of Sections 201 and 202 of the Communications Act. *See Second Report and Order*, 11 FCC Rcd. at 20,743. Indeed, in its *Second Report and Order*, the FCC found that compliance with the substantive requirements of these provisions would be adequately assured in the present competitive market by customers either "switch[ing] to different carriers," or availing themselves of the "complaint process" prescribed by Section 208 of the Communications Act. *Id.*

Thus, and contrary to Petitioner's claim, customers of long distance service carriers have sufficient remedies to address a carrier's alleged malfeasance – they can either switch carriers and/or avail themselves of the complaint process set forth in the Communications Act. For this reason, it is not important for this Court to decide whether customers may also bring state claims in addition to the remedies provided in Communications Act.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSEPH A. BOYLE
Counsel of Record
LAURI A. MAZZUCHETTI
KELLEY DRYE & WARREN LLP
200 Kimball Drive
Parsippany, New Jersey 07054
(973) 503-5900

DANNY E. ADAMS
KELLEY DRYE & WARREN LLP
8000 Towers Crescent Drive
Suite 1200
Vienna, Virginia 22182
(703) 918-2300

Attorneys for Respondent